Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

AMERICAN WATER DEVELOPMENT, INC.,
a Colorado corporation,

Petitioner,

v.

CITY OF ALAMOSA, et al.,

Respondents.

Petition For Writ Of Certiorari
To The Colorado Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER COLORADO'S COURTS IMPERMISSIBLY DIMINISHED RIGHTS GRANTED BY HISPANIC LAW IN VIOLATION OF THE TREATY OF GUADALUPE HIDALGO BY ALLOWING A COLLATERAL ATTACK ON THE DETERMINATION MADE BY CONGRESS AND THE U.S. GOVERNMENT SURVEYOR THAT THE BACA GRANT RANCH NO. 4 IS A CONFIRMED HISPANIC LAND GRANT.

II. WHETHER DUE PROCESS WAS VIOLATED BY THE MONEY JUDGMENT AWARDED TO "OBJECTORS" WHO VOLUNTARILY ENTERED AWD'S WATER PROCEEDINGS BECAUSE AWD NEVER HAD A FULL AND FAIR OPPORTUNITY TO CONTEST THEIR ENTITLEMENT TO THE AWARD, AND UNDER COLORADO LAW THE OBJECTORS NEVER HAD TO SATISFY ANY STANDING REQUIREMENTS.

PARTIES TO THE PROCEEDING

The Petitioner is American Water Development, Inc., a Colorado corporation ("AWD"). Pursuant to Rule 29.1, AWD states that its parent corporation is First Colorado Corporation, a Delaware corporation, and that it has no subsidiaries except wholly owned subsidiaries.

The following parties are Respondents: The City of Alamosa; County of Alamosa; Fred Bauder; Richard Blumenhein; Bonanza Road Water Users, Owners and Objectors; David P. Collins; Barbara J. Collins; Colorado Division of Wildlife; Colorado Water Conservation Board; Conejos Water Conservancy District; Town of Crestone; Oliver Powell Roemer, III, Successor Trustee under the Trusts under the Will of Avis Neal Roemer; Ernest Lamar Goodwin; Town of Lajara; Lazy KV Estates Homeowners Association, Inc.; Marold Ranches; R.G. Marold; Town of Monte Vista; Howard R. Platz; Rio Grande County Commissioners; Rio Grande Water Conservation District; Rio Grande Water Users Association; County of Saguache; San Luis Valley Irrigation Well Owners, Inc.; San Luis Valley Water Conservancy District; Loren R. Santisteven; Julie A. Santisteven; Jeris A. Danielson, State Engineer; Steven E. Vandiver, Division Engineer; United States of America; Villa Grove Area Water Users, Owners and Opposers.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

Petitioner, American Water Development, Inc. ("AWD") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Colorado entered in this proceeding on May 9, 1994.

OPINIONS OF LOWER COURTS

The Colorado Supreme Court issued its opinion in this matter on May 9, 1994. The opinion is reported at 874 P.2d 352 (Colo. 1994) and is reprinted beginning at A-1. The Order of the Colorado Supreme Court denying rehearing, dated June 6, 1994, is not officially reported. It is reprinted at A-131. The subject orders of the Colorado water court are not officially reported; they are reprinted at A-94-130.

JURISDICTION OF THIS COURT

1. The judgment sought to be reviewed was entered by the Colorado Supreme Court on May 9, 1994.

2. Petition for Rehearing was denied on June 6, 1994. No extension of time for the filing of this Petition has been requested or granted.

3. Jurisdiction is conferred pursuant to 28 U.S.C. § 1257(a).

APPLICABLE STATUTES, TREATIES AND CONSTITUTIONAL PROVISIONS

U.S. CONST. amend XIV § 1: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

U.S. CONST. art. VI, cl. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

COLO. CONST. art. XVI § 5: "Water of streams public property. The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided."

COLO. CONST. art. XVI § 6: "Diverting unappropriated water – priority preferred uses. The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes."

COLO. REV. STAT. § 37-92-302(1)(b): "Any person, including the state engineer, who wishes to oppose the application may file with the water clerk in quadruplicate a verified statement of opposition setting forth facts as to why the application should not be granted or why it should be granted only in part or on certain conditions."

Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico (Treaty of Guadalupe Hidalgo), A-195.
Act of July 22, 1854 Ch. 103, 10 Stat. 308, A-220.
Act of June 21, 1860, Ch. 167, 12 Stat. 71, A-234.
Act of June 11, 1864, Ch. 123, 13 Stat. 125, A-238.

STATEMENT OF THE CASE

Water is like gold in the West. Roughly two billion acre-feet of groundwater exist in the San Luis Valley of southern Colorado. *Alamosa-LaJara Water Users Protection Ass'n v. Gould*, 674 P.2d 914, 917 (Colo. 1983). In 1986 AWD filed its application in Colorado's local water court to withdraw one hundredth of one percent of that groundwater annually from beneath lands it owns or controls. A-133-155. The treatment of AWD's application implicates broad legal and policy concerns that affect critical federal, state and private interests throughout the vast lands in the American Southwest that once belonged to Spain.

In 1706 southern Colorado was claimed for the Spanish King. A-270, 277. The area was governed by decrees issued by the Spanish Crown, laws passed by the Royal Council of the Indies, and local legislation enacted by provincial governors and local town councils. A-274. Southern Colorado formed the northern boundary of Mexico when it won independence from Spain in 1821. *Id.* The area was then governed by the general laws of the Mexican Republic and by a series of Mexican constitutions promulgated in 1824, 1836 and 1843. *Id.* For matters not covered by Mexican law, reference was made to Spanish law. *In Re Water Rights of the Medina River Watershed*, 670 S.W.2d 250, 252 (Tex. 1984).

Settlement of New Mexico and southern Colorado was encouraged by the use of land grants, first from Spain and later from the Mexican government. Grants were made to individuals and families, and sometimes to groups of settlers. A-281-285. In January, 1821, the provincial deputation of the State of Durango, New Spain, granted to Luis Maria Cabeza de Baca approximately 500,000 acres of land, known as the Vegas Grandes, in what is now northern New Mexico. A-164. The grant to Baca and his seventeen sons was affirmed by Mexico in 1825, after it gained indepen ence from Spain. A-165. In 1835, long after the grant to Baca, a grant was made by the Mexican government to a group of settlers who founded the Town of Las Vegas upon the Vegas Grandes. A-170-175.

In 1848, the United States agreed to end the Mexican-American war. The Treaty of Guadalupe Hidalgo, ratified by Congress in 1848 (the "Treaty"), set forth the agreement between the United States and Mexico to end hostilities. A-195-219. Under the Treaty, Mexico ceded to the United States lands north of the Rio Grande River, including what is now California, Nevada, and Utah, and parts of New Mexico, Arizona, Wyoming and Colorado. Bowden, *Spanish and Mexican Land Grants in the Southwest*, 8 U. WYO. LAND & WATER L. REV. 467, 468 (1973). The southwestern portion of the ceded territory contained 303 Spanish or Mexican land grants covering 35.85 million acres. *Id.* at 472. It included the land granted to Baca and his heirs. Under the Treaty, the United States agreed to protect and preserve the rights of Mexican citizens in ceded lands. A-195, 203 and 204.

Congress implemented these provisions of the Treaty by the Act of July 22, 1854, Ch. 103, 10 Stat. 308 (the "1854

Act"), which directed the Surveyor General for the New Mexico Territory to "(1) determine the extent of all claims under the laws, usages and customs of Spain and Mexico, and (2) report [to Congress] his decision on the validity of all such claims *as originated before the cession of the territory . . . to the United States* (emphasis added)." A-220, 223. Section 8 of the 1854 Act required the report to be presented to Congress as the final arbiter, so it might "confirm bona fide grants." The 1854 Act also reserved all of the ceded Territory of New Mexico (which included the San Luis Valley of southern Colorado) from the public domain pending settlement of the land claims. A-224.

The Surveyor General found the grant to the Baca heirs to be valid and enforceable, and recommended confirmation. A-193, 227, 232, 233. Based upon the Surveyor General's Report, Congress confirmed the grant to the heirs of Baca on June 21, 1860 in § 3 of the Act of such date, Ch. 167, 12 Stat. 71 (the "1860 Act"). A-234-237. The 1860 Act also confirmed the claim of the Town of Las Vegas. *Id.* By the time the claims of the Baca heirs and the Town of Las Vegas were presented to Congress in 1860, several hundred families had taken up residence on the Vegas Grandes site. S. Rep. No. 228, 36th Cong. 1st Sess. (1860). A-227, 232. The Surveyor General chose not to decide the conflict between the Baca heirs and the Town as to which of them was entitled to the Vegas Grandes location, and left the matter to Congress to resolve. The Congressional record indicates that the heirs of Baca agreed to subordinate their site priority to that of the other settlers by waiving their senior site priority[1] and

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[1] This was a waiver of a *site priority* only, and nothing more. *Wise v. Watts*, 239 Fed. 207, 226 (9th Cir. 1917).

exchanging equities. A-232-233. The Baca heirs received a "floating grant" in payment for waiving their senior site priority. Congress formalized this arrangement by effecting the grant pursuant to § 6 of its 1860 Act.

Within the three-year limits set by Congress in the 1860 Act, the heirs of Baca or their assignees selected certain parcels of land under the floating grant. One of those parcels, containing approximately 100,000 acres, is located in what is now Saguache County, Colorado, and is known as the Baca Grant Ranch No. 4 (the "Baca Grant 4"). A-8.

In 1986, AWD, owner of the Baca Grant 4, filed an application in the Water Court, First Division, seeking an adjudication of rights to groundwater underlying the ranch and other smaller parcels of property owned by it. A-133-155. AWD's application sought water rights under four alternative theories. Claim I sought to withdraw non-tributary groundwater as specified by Colorado statute (the "Non-tributary Claim"). A-138-143. Under Claims II and III, AWD sought a declaration that it owned all of the underground water, tributary or otherwise, beneath the Baca Grant 4. A-143-150. Claim II was based on the status of AWD's predecessors in interest as the *confirmed grantees* of nearly 500,000 acres of land, 100,000 of which formed the Baca Grant 4. Title derived *directly* from grants made by the Spanish and Mexican governments. Alternatively, under Claim III, AWD claimed to be the beneficiary of a grant from the United States having the same effect. (Claims II and III are AWD's "Land Grant Claims".) In Claim IV, AWD sought to withdraw water under Colorado's statutes governing the appropriation of tributary groundwaters (the "Tributary Claim"). A-151-153.

Notice of AWD's application was given pursuant to statute, and "Statements of Opposition" were filed by 128 "Objectors." Colorado allows "any person" to enter such water proceedings as an Objector without satisfying any standing requirements whatsoever, COLO. REV. STAT. § 37-92-302(1)(b) (1993), let alone the traditional tests for standing developed by the federal courts and adopted by the courts of Colorado. Objectors often oppose water applications in Colorado, and in doing so they are not required to show they suffer any concrete "injury in fact" that distinguishes their interests from those of the public at large.

The Objectors sought summary dismissal of the Land Grant Claims. After a short argument, the trial judge declared from the bench that "the Applicants have neither the facts nor the law on their side." He then *summarily* dismissed AWD's Land Grant Claims "for all of the reasons argued by objectors." A-101-109. On direct appeal to the Colorado Supreme Court, AWD raised, in its briefs and upon oral argument, the federal land grant questions asserted herein, as set out in the court's opinion. A-12-29. The Colorado Supreme Court affirmed, holding Baca Grant No. 4 is not really an Hispanic land grant, and no water rights were conveyed by grant from the United States. A-20-29.

AWD neither specified nor sought out the Objectors who entered its water court proceedings. AWD had no control over who the Objectors were, or how many of them it would face. It had no effective way to rid itself of their intervention. The Objectors voluntarily came forward to have their say in the politically-controversial case. By their own admission, they used the unusual freedom given by Colorado to Objectors to wage more than legal warfare in the water court. When asked, for example, why they never filed dispositive motions on AWD's Tributary Claim, an attorney for the United States,

which entered the case as an Objector, frankly conceded: "So we didn't file a dispositive motion because [even] a dismissal with prejudice . . . may not preclude them from coming back. . . . So it's perfectly legitimate to destroy the enemy on the battlefield while you have him decisively engaged rather than let them get away to fight another day." A-360, 361.

An affidavit voluntarily filed with the water court by a former attorney for the State of Colorado, another Objector in the case, corroborates the candid admissions of the U.S. attorney. The affidavit demonstrates the Objectors deliberately chose not to seek pretrial disposition of AWD's Tributary Claim, despite their awareness of grounds for doing so. A-367-369. The Objectors instead pursued a political agenda that went far beyond defeating AWD in court.

The Objectors' political strategy paid off. Shortly before trial, AWD realized it could not prevail on its Tributary Claim because adverse pretrial rulings had decimated its legal position, and its inability to secure end-user contracts precluded its satisfaction of Colorado's factual predicates for withdrawal of tributary water. AWD moved to withdraw its Tributary Claim without prejudice under Colorado's analog to Fed.R.Civ.P. 41(a), so it could proceed to trial on its remaining theories. A-356; A-358-359.

At first the Objectors opposed AWD's motion. The volunteers, it seems, had voluntarily taxed themselves, assessed themselves, and borrowed heavily to support their efforts to defeat AWD. A-362-364. Final and decisive victory was their stated goal. Soon, however, the Objectors changed their position when they realized that, in exchange for the dismissal without prejudice which AWD

sought in good faith, the water court was willing to award to them the substantial attorneys' fees and costs incurred by them in connection with their battle against AWD. The court went so far as to order AWD to pay not only those fees and costs attributable to work that could no longer be used in the case, but rather *all* fees and costs "related to" the Objectors' opposition to the Tributary Claim, even though much of the work that went into that opposition could be used – and later was used – in the trial of AWD's other claims. A-113; A-118.

The judge denied AWD's repeated requests for a due process hearing that would provide a full and fair opportunity for AWD to contest the Objectors' entitlement to such an unusual award, unprecedented as it was in the specialized arena of Colorado's water court proceedings. A-121; A-127; A-129-130. The water court revealed its predisposition to prejudge the applicant's due process concerns when the judge stated, on the record, "I'm mak[ing] the assumption your motion is going to go down in blazing technicolor." A-119-120. A hearing was held, months after the trial on AWD's remaining claims, for the sole purpose of ascertaining the amounts to be awarded to the Objectors. In May of 1992 a $2.7 million judgment was entered against AWD and in favor of the Objectors. Most of that judgment reflected the attorneys' fees and costs that were sought by the Objectors in connection with the pretrial dismissal of AWD's Tributary Claim. AWD was never given the opportunity to accept the award as reasonable "terms and conditions" imposed upon it for the dismissal of its Tributary Claim without prejudice, or to reject the award and take instead a dismissal of that claim with prejudice.

On appeal AWD raised its cluster of standing, due process and related concerns in its opening brief, A-371-374; in its reply brief, A-375-376; in its petition for rehearing, A-377-380; and during oral argument. The Colorado Supreme Court upheld the award in all respects. A-64-93; 874 P.2d at 379-390.

ARGUMENT

I. THE COURTS BELOW IMPERMISSIBLY DIMINISHED RIGHTS GRANTED BY HISPANIC LAW IN VIOLATION OF THE TREATY BY ALLOWING A COLLATERAL ATTACK ON THE DETERMINATION MADE BY CONGRESS AND THE GOVERNMENT SURVEYOR THAT THE BACA GRANT 4 IS A CONFIRMED HISPANIC LAND GRANT.

Rights to the ownership and use of water have been regulated since the beginning of recorded history. Under the Supremacy Clause, the State of Colorado must respect as binding upon it the rules governing those rights that Congress acknowledged in the Treaty.[2] In its Land Grant Claims, AWD claims rights under the Treaty to groundwater historically considered as percolating underground water. The law relevant to this claim was promulgated in 1256 in the Spanish Code "Las Siete Partidas". Under the Partidas, underground waters are presumed to be percolating waters, owned by the surface owner, who is entitled to draw those waters from his land at will. *Maricopa*

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[2] Review by this Court of the state courts' actions is proper, because a substantial federal question is raised about the nature of AWD's rights under the 1854, 1860 and 1864 Acts, particularly proper construction of the Acts, and the Treaty. *Summa Corp. v. California Ex Rel State Lands Com'n*, 466 U.S. 198, 201 (1984).

County Mun. Water Cons. Dist. v. Southwest Cotton Co., 39 Ariz. 65, 4 P.2d 369, 373 (Az. 1931). These underground waters were not subject to appropriation by other landowners, unless they ran in definite channels. *Id.* at 373. This Spanish law was brought to Mexico and was in effect at the time of the Treaty. *Id.* at 373.

Colorado became a Territory in 1861 and a State in 1876. Even before statehood, Colorado began to limit the Spanish concept of ownership of subterranean waters by the owner of the land. In its Constitution, Colorado declared that all waters in natural streams belong to the public. COLO. CONST. art. XVI, §§ 5, 6.

Colorado follows the doctrine of "prior appropriation" in establishing rights to water in its natural streams. *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800 (1976). Under this doctrine, one acquires a right to water by diverting it from its natural source and applying it to beneficial use. *Id.* at 805. While theoretically the doctrine applies only to waters in natural streams, Colorado goes further than any other western state in applying the doctrine to groundwater as well as surface water. Colorado courts hold that *all* underground waters which by flowage, seepage, or percolation will eventually, if not intercepted, reach and become a part of a natural stream, either on or beneath the surface, are included as being part of a natural stream, subject to application of the prior appropriation doctrine. *Black v. Taylor*, 128 Colo. 449, 264 P.2d 502 (1953). There is even a presumption that *all* water in Colorado is part of a natural stream. *Whitten v. Coit*, 385 P.2d 131 (Colo. 1963). Most of the water in Colorado, whether underground or surface water, is accordingly treated as "tributary," and is useable only

under the doctrine of prior appropriation as implemented by Colorado's statutes and cases.

The courts below held that the water underlying the Baca Grant 4 was "tributary" as defined in COLO. REV. STAT. § 37-93-103(10.5). A-10. To the extent its rights are governed by Colorado rather than Hispanic law, AWD's claims to the water underlying its ranch thereby became subject to claims of others who have previously appropriated the water. And, to obtain a vested right recognized under Colorado law, so it can market the water or otherwise put it to use, AWD now must demonstrate an intent to take the water and put it to beneficial use by an open physical act sufficient to constitute notice to third parties. *Colo. River Water Conserv. Dist. v. Vidler Tunnel*, 594 P.2d 566 (Colo. 1979).

In short, AWD had to show it had contracts with users of all of the water claimed in the adjudication, that it could transport the water to the users, and that it could obtain all necessary permits. The Objectors successfully launched massive political efforts to prevent AWD from obtaining user agreements and any necessary rights-of-way or permits. A-342. The doctrine of prior appropriation, as applied to the water underlying the Baca Grant 4, effectively limits the water available to AWD, and increases the difficulty of putting that water to beneficial use.

The Land Grant Claims asserted, by contrast, that under the Treaty, AWD, as the owner of an Hispanic grant, retained all vested rights of property to which Baca was entitled under the laws of Mexico or Spain. AWD asserted that under Hispanic law, groundwater, whether tributary or non-tributary under Colorado law, was the property of the overlying surface owner, and Colorado

had no authority to deprive any such owner of his rights, at least without compensation.

Ninety years before AWD filed its case, *this Court* conclusively determined that the Baca Grant 4 is a confirmed Hispanic land grant. *Shaw v. Kellogg*, 170 U.S. 312, 341 (1898). The issues raised by AWD's application involve the nature and extent of the rights to underground water that passed to the successors of the Baca heirs under Hispanic law. What the Colorado Supreme Court decided, however, was something that was *not* open to readjudication: that the title to Baca Grant 4 was not derived from Spain or Mexico!

As this Court held in *Beard v. Federy*, 70 U.S. 478 (1865), the holder of a confirmed grant should not be required to establish the validity of his Hispanic title in subsequent litigation, for if collateral attacks are allowed against rights under Hispanic law, or the correctness of the prior actions of the United States, then the confirmation would fail to provide the very security of title that was intended. The confirmed owner could face inconsistent determinations of his rights, based on the whims of subsequent witnesses and juries. *Id.* at 492. In making this ruling, the Colorado courts deprived AWD of the rights assured to it as the successor to Mexican citizens protected by the Treaty, and also created dangerous precedent that allows state courts to readjudicate titles originated from Spain and Mexico, and confirmed by Congress over 130 years ago.

The Colorado courts have threatened the security of the vested rights of the heirs and successors of the original Mexican grantees, by revisiting and rejecting the conclusions made by the Surveyor General, and by Congress itself, that the grant to the heirs of Baca is indeed a

"confirmed" Hispanic grant. This result was a blatant effort to avoid addressing the politically-charged issue of the rights to underground water owned by the heirs of Baca, which passed to AWD.

A. State Courts Reach Inconsistent Decisions Regarding Water Rights Incident To Hispanic Land Grants.

With the status of water under thirty-plus million acres of the Southwest at stake, the implementation of U.S. treaty obligations respecting water rights has been left largely to the state courts. With environmental, property and development concerns in the forefront, the courts of the states have reached inconsistent results. A conflict exists among the highest courts of several states concerning the nature and extent of water rights derived from Hispanic land grants. Some cases have the practical effect of depriving owners of Hispanic grants of their rights under the Treaty. But the cases *all* hold that the existence and definition of water rights associated with Hispanic land grants are determined under the Spanish or Mexican law applicable at the time of the grant. *State v. Valmont Plantations*, 346 S.W.2d 853 (Tex. Civ. App. 1961), *aff'd*, 355 S.W.2d 502 (Tex. 1962); *Maricopa County Mun. Water Cons. Dist.*, 4 P.2d at 373-376.

Arizona, on the one hand, recognizes vested rights in percolating, subterranean waters under private lands based on Mexican law in effect at the time of the grant. *Maricopa County Mun. Water Cons. Dist.*, 4 P.2d at 373-376. California and New Mexico have also recognized that Hispanic grants carry water rights without any requirement that the grant expressly convey them. In *Cartwright v. Public Service Co.*, 343 P.2d 654 (N.Mex. 1958), the New

Mexico Supreme Court applied the Treaty to hold that under Hispanic law, the rights of the Town of Las Vegas to the waters adjacent to the land or flowing through it, as necessary for municipal purposes and supply of its inhabitants, were prior and superior to any right claimed under the laws of the state. The court relied upon two California decisions, *Vernon Irrigation Co. v. City of Los Angeles*, 106 Cal. 237, 39 P. 762 (1895), and *Lux v. Haggin*, 69 Cal. 255, 10 P. 674 (1886). Texas, by contrast, recognizes neither pueblo water rights nor surface water rights under Hispanic law, absent an express grant of such rights by the prior sovereign. *In Re Water Rights of the Medina River Watershed*, 670 S.W.2d at 252; *In Re Water Rights of the Cibolo Creek Watershed*, 568 S.W.2d 155 (Tex. App. 1978); *In Re Contests of City of Laredo*, 675 S.W.2d 257 (Tex. App. 1984). The inconsistencies among the cases, and the trend toward limiting treaty rights under them, deserve this Court's attention.

And while Colorado has not expressly ruled on the nature of the rights of owners of Hispanic grants, the decision in this case indicates a hostility to recognizing Hispanic rights. Both courts below declined to recognize Hispanic rights by determining, somehow, that Baca and his heirs were not even the holders of rights arising under Hispanic law! In reaching this conclusion, the Colorado courts misapprehended the Treaty and the Acts of Congress implementing it, and failed to consider their obligations under the Treaty to "inviolably" respect Mexican citizens' rights in ceded lands.

Such hostility by state courts to "inviolably respecting" rights of Mexican citizens in lands obtained from Mexico is not confined to Colorado and Texas. In *City of Las Vegas v. Oman*, 796 P.2d 1121 (N.M. App. 1990), the

New Mexico Court of Appeals invited diminishment of the pueblo rights recognized in the City of Las Vegas in the *Cartwright* case. The *Oman* court held that the lower court could receive evidence regarding the historical accuracy of the pueblo rights doctrine if it believed the state supreme court might reconsider the principles set forth in *Cartwright*. The decisions of the Colorado and New Mexico courts in this case and *Oman* evidence the trend in state courts toward disregarding Hispanic rights protected by the Treaty. The issues are not limited to water. *See, e.g., United States v. Abeyta*, 632 F.Supp. 1301 (N.Mex. 1986) (religious freedom) and *Rael v. Taylor*, 876 P.2d 1210 (Colo. 1994) (communal land rights).

No courts have overtly refused to recognize Hispanic rights altogether, but like the Colorado courts in this case, some of the decisions have had that effect. There is a disturbing trend toward limiting and ignoring rights vested in Hispanic land grants. The Colorado Supreme Court's decision is only the latest in this trend. This Court, by contrast, has consistently recognized the U.S. Treaty obligations and has recognized the need to preserve and protect rights under Hispanic law. Action by this Court is needed to stop the erosion by those states which trivialize Hispanic rights under the Treaty.

The Treaty is the supreme law of the land and the judges in every state are bound by it. U.S. CONST. art. VI, cl. 2. This Court should stop the continuing disregard of Treaty rights by state courts by accepting certiorari in this case and reviewing the actions of the Colorado courts.

B. Colorado Exceeded Its Authority in Determining that the Baca Grant 4 is Not a Confirmed Hispanic Land Grant.

The 1860 confirmation of the Baca Grant 4 as an Hispanic land grant has been acknowledged by Congress itself in enactments made since the 1860 Act. The history of Congress' confirmation starts with the 1854 Act, which directed the Surveyor General to determine, and report to Congress, the extent of all claims under Hispanic law. A-220, 223. Pursuant to the Surveyor's recommendation, Congress confirmed the grant to Baca and his heirs in section 3 of the 1860 Act, which specifically confirmed Claim No. 20, covering property known as the Vegas Grandes, which included the claims of Baca and the Town of Las Vegas. A-235. *Maese v. Herman*, 183 U.S. 572, 578 (1902). The claims of Baca and the Town overlapped; the Baca heirs waived their site priority; and they received a "floating grant" equal to their Vegas Grandes grant, to be located in the New Mexico Territory. A-232-233.

Congressional confirmation of the Hispanic grant to Baca and his heirs was conclusive and not subject to judicial review. *Henshaw v. Bissell*, 85 U.S. (18 Wall.) 255, 264 (1873); *Tameling v. U.S. Freehold and Emigration Co.*, 93 U.S. (3 Otto.) 644 (1877). Colorado now attempts to avoid the conclusive effect of this confirmation by simply rewriting the 1860 Act. The Colorado Supreme Court held that Congress' express confirmation of the grant to the Baca heirs confirmed only their claim to the Vegas Grandes, and not their right to an equal amount of land elsewhere based on the Hispanic grant. The Colorado courts further held that Congress' confirmation of the grant to Baca was, in effect, meaningless because it was somehow negated by provisions elsewhere in the Act

allowing the selection of an alternate but equal quantity of land.

This reconstruction of the 134 year-old 1860 Act misinterprets the "waiver of the older title" accepted by the Baca heirs. By this sleight of hand, the court evaded the need to even consider Hispanic law, and the Treaty obligations to honor it. Nowhere in the Congressional record does it appear, however, that the heirs of Baca were willing to waive their claim to an Hispanic grant of 500,000 acres. Nor does it appear anywhere that Congress intended that the Baca heirs give up *any* of their rights, other than the right to have their grant located at the Vegas Grandes. The heirs of Baca agreed only to subordinate their site priority to that of the Town settlers and exchanged equities. They did *not* waive their claim to a confirmed grant, but only their priority, accepting a floating grant in lieu of their claim to the specific property known as the Vegas Grandes. *See Lane v. Watts*, 234 U.S. 525, 528 (1914) (both grants were confirmed and the right was given to the heirs of Baca to select other lands equal in quantity to the lands claimed by Las Vegas); *Shaw v. Kellogg*, 170 U.S. at 641.

Shaw recognized that Congress confirmed in the Baca heirs the right to locate their 500,000 acres within the New Mexico Territory, which had been acquired from Mexico and set aside specifically in the 1854 Act to satisfy Mexican claims. *Id.* at 644. The right of the Baca heirs to receive their land, by virtue of an Hispanic grant, was all that was before Congress and all that it decided. The language of the 1860 Act can only be applied to an *existing* grant, and there is no indication that Congress intended to create any sort of new estate. Even though unlocated, the Baca grant was thus a confirmed, valid

grant derived from the prior sovereigns. That the property selected by the Baca heirs came out of the public domain does not change this conclusion. The United States acquired title to all lands ceded from Mexico subject to claims of Mexicans, whether grounded upon an inchoate or perfect title. *Newhall v. Sanger*, 92 U.S. 761, 764 (1875). Under the Treaty all such claims were to be ascertained and legally protected. *Id.*

In *Board of Cty. Cmm'rs v. Central Colo. Imp. Co.*, 95 U.S. 259 (1877), this Court addressed a nearly identical situation, in which Congress authorized the holder of an Hispanic grant to select lands in lieu of lands subject to a Mexican grant which had been occupied and improved by settlers. This Court stated: "We agree . . . that the title when perfected relates back to and is founded on the grant by Mexico; but since it was imperfect . . . no particular land passed under the grant until the selections were made under the act." *Id.* at 266. The Baca grant was perhaps similarly "imperfect" due to the overlap with the Town, but it was nonetheless a valid grant from the Mexican government, "perfected" upon relocation, and confirmed as such by Congress.

The Colorado Supreme Court, however, treated the floating grant as no different from any conveyance of lands from the public domain of the United States to a private citizen, blatantly ignoring that the claim of the Baca heirs arose directly from the Hispanic grant. This deprives AWD, as successor to the heirs of Baca, of those rights incident to Hispanic grants, which Congress solemnly agreed to honor in the Treaty.

Hispanic laws and customs allowed for floating grants, such as the one confirmed to the Baca heirs by Congress, which were as effective as grants for specific

parcels of property. *United States v. McLaughlin*, 127 U.S. 428, 448 (1888). Hispanic laws and customs also allowed for the selection of alternate lands when two parties were separately given grants to the same property by officials with proper authority, as can be seen from the Mexican order of 1825 which put Baca into possession of the Vegas Grandes. A-156, 189-190. The order provided that even if settlers had constructed improvements upon the Vegas Grandes, Baca could nonetheless obtain possession if he paid the settlers for their improvements, and they would then be given substitute lands. *Id.*

The Senate Committee on Private Land Claims recognized the indemnity given to Baca was not charity, but an obligatory recognition of Mexican law and custom, noting the proposed resolution "[w]ould have undoubtedly been acceded to by Mexico if the territory had remained hers, and to whose rights and *duties* the United States have succeeded." A-227, 232-233; *see also United States v. Redondo Dev't Co.*, 254 F. 656, 659 (8th Cir. 1918) (the Baca floats were "not a largess or bounty to the Baca heirs, but a right founded on treaty obligations recognized by Congress").

The confirmation to the Baca heirs was again acknowledged by Congress in the Act of June 11, 1864, Ch. 123, 13 Stat. 125 (the "1864 Act"), A-238-239, which amended the 1860 Act to enable the heirs of Baca to relocate one of the five square tracts "*confirmed to them by said Act.*" [Emphasis supplied.] The Colorado Supreme Court disregarded three separate references in the 1864 Act to a located Baca float as "confirmed," by suggesting that only the Baca claims to the Vegas Grandes were confirmed. In the 1864 Act, however, Congress was referring specifically to the lands selected by the Baca heirs

upon which to locate portions of their floating grant. There is no ambiguity whatsoever in the legislative language, and the located floating grants were indeed "confirmed." Even as recently as 1990, Congress referred to a Baca grant as a "large Spanish land grant." A-240, 254. The Colorado Supreme Court improperly held that Congress did not mean what it said when it used the words "confirmed" and "Spanish land grant." *See Maese v. Herman*, 183 U.S. 572 (1902).

Colorado's refusal to treat the Baca Grant 4 as a confirmed Hispanic grant effectively disenfranchises numerous Colorado citizens who rely upon three centuries of Hispanic law, custom and usage to define their rights. Reopening the conclusive determinations of Congress to challenge and diminish established Hispanic rights exposes the owners of 35.85 million acres in the Southwest to the frustration of legitimate expectations concerning issues settled long ago. It matters not whether states reject the substantive rights guaranteed to successors in interest to Hispanic grants, or refuse to recognize conclusive determinations that the grants are confirmed and entitled to Treaty protection. Either way, the rights are disregarded.

C. At a Minimum, AWD's Rights Arise by United States' Grant.

The Colorado Supreme Court concluded the Baca heirs received title to the Baca Grant 4, not under an Hispanic grant, but simply as a grant from the public domain. The court then held the Baca heirs received no rights to water by U.S. grant, because grants of federal lands carry with them no water rights. This analysis ignores that Congress meant to place the Baca heirs in a

position of *equality* vis-a-vis their interest in the Vegas Grandes. Section 6 of the 1860 Act used the stronger operative word "equal" rather than the weaker word "equivalent" contained in the Senate Committee Report. Compare A-236 with A-233. Congress' intent to satisfy the Treaty by maintaining equality for the Baca heirs could only have been accomplished by recognizing in them the same bundle of rights they would have secured under Hispanic law.

Congress even reserved specific lands to accomplish its end. The holding that water does not follow land in federal grants ignored both general case law and the special facts of this case. Under the Colorado Supreme Court's own analysis, the United States, as the successor to the original sovereigns, was free to dispose of land and water together or separately. *State Dept. of Natural Resources v. Southwestern Colo. Wtr. Cons. Dist.*, 671 P.2d 1294, 1306 (Colo. 1983). In *United States v. City and County of Denver*, 656 P.2d 1 (Colo. 1982), the court itself recognized the *validity of implied water rights* on federal reservations based upon original land ownership by the federal government. As explained above, even if the Baca grant is not recognized as a cession directly from Spain and Mexico, it was created out of lands *reserved* by Congress in § 8 of the 1860 Act in discharge of its Treaty obligations. Those substantive Treaty obligations strengthen, rather than weaken, AWD's equities.

The Act of 1860 was passed to enforce the Treaty and its interpretation requires consideration of the intent of Mexico, not just the intent of the United States. *Absentee Shawnee Tribe of Indians v. Kansas*, 862 F.2d 1415 (10th Cir. 1988). Mexico intended to protect the rights of its citizens

in the property being ceded. Colorado's narrow construction of the grant, and broad construction of the waiver of site priority, violates Mexico's intent under the Treaty, and further violates the principal that an act of Congress ought never to be construed to violate the law of nations if any other construction remains. *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 67 (1804).

In short, AWD's claims were derived from Hispanic law, were confirmed by Congress, and were not subject to diminishment by the Colorado courts. The summary dismissal of the Land Grant Claims was incorrect. Reversal and remand are required to determine the nature and extent of AWD's rights under Hispanic law.

II. AWD WAS DEPRIVED OF DUE PROCESS BY THE MONETARY JUDGMENT AWARDED TO "OBJECTORS" WHO VOLUNTARILY ENTERED AWD'S WATER PROCEEDINGS BECAUSE AWD NEVER HAD A FULL AND FAIR OPPORTUNITY TO CONTEST THEIR ENTITLEMENT TO THE AWARD, AND UNDER COLORADO LAW THE OBJECTORS NEVER HAD TO SATISFY ANY STANDING REQUIREMENTS.

Due Process protects those who suffer from unpopularity as well as those who purport to be more "politically correct." The case of the politically-unpopular AWD implicates the most fundamental purpose of the Constitution: to put the brakes on political excess. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 1-7 (1978). For however much the Objectors may have been acting within their statutory rights in opposing AWD in its water court proceedings, it is "fundamentally unfair" for AWD to have to pay for their admittedly political efforts.

In *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992), this Court held Congress cannot constitutionally relieve voluntary litigants from having to comply with traditional standing requirements. Just as Colorado's legislature has done in water cases, *see* COLO. REV. STAT. § 37-92-302(1)(b) (1993), Congress had attempted to allow "any person" to litigate certain environmental claims without having to show "injury in fact." This Court held that "ignoring the concrete injury requirement . . . would be discarding a principle fundamental to the separate and distinct constitutional role" of courts. 112 S. Ct. at 2144-45; *see also Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (Congress cannot "abrogate" the constitutional "minima" when it comes to standing).

The public's interest in water and environmental matters simply cannot, according to this Court, "be converted into an individual right by a statute . . . that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm)" to present their claims in litigation. 112 S. Ct. at 2145. The issue is not merely quantitative, as the Colorado Supreme Court's opinion in this case suggests. A-69; 874 P.2d at 381. No one denies the Objectors spent a lot of money pursuing their political agenda; they had every right to tax themselves, assess themselves, and incur indebtedness in doing so. The issue, rather, as this Court recognizes, is qualitative in nature: whether the person who voluntarily comes before the judiciary suffers some direct, discrete injury or is merely asserting he suffers in some indefinite way in common with other people generally. 112 S.Ct. at 2142-46.

The water court's award of $2.7 million to the Objectors strays further from these fundamental principles

than the constitution permits. Not only were the Objectors allowed to insert themselves voluntarily into AWD's case under a statute that opens the courthouse door to "any person" without regard for the dictates of standing, but they were also rewarded for their political efforts with a massive monetary judgment. Federalism may tolerate the former, but due process cannot tolerate the latter. It's one thing to invite the Objectors to contest AWD's application under a statute that exercises the State's prerogative to relax standing requirements in its courts. *See, e.g., Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988); *Asarco Inc. v. Kadish*, 490 U.S. 605, 617 (1989). But it's quite another to take the next step and force AWD to pay for the Objectors' efforts, especially since those efforts went beyond seeking a favorable outcome in the adjudication. *See, e.g., Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856) (the government is not free to make any process "due process of law" by its mere will); *Twining v. New Jersey*, 211 U.S. 78, 106 (1908) (due process prohibits procedures that abridge any fundamental principle of justice).

Despite the unprecedented nature of the award against AWD, the Colorado Supreme Court nevertheless failed to even directly address AWD's standing and due process arguments. A-68-69; 874 P.2d at 381. That failure was inconsistent with Colorado's announced reliance upon this Court's precedent in implementing the state's own standing requirements. *See, e.g., Wimberly v. Ettenberg*, 570 P.2d 535, 538-39 (Colo. 1977); *General Assembly v. Lamm*, 700 P.2d 508, 516 (Colo. 1985) ("the requirement of an injury in fact is of constitutional dimension"). But whether or not Colorado courts were willing to address AWD's constitutional concerns, it is the role of *this* Court

to assure "that state courts will not be the final arbiters of important issues under the federal constitution." *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940).

This Court must insure that the judgment conforms with constitutional requirements, for it is the constitutional dimension of standing and its nexus with the demands of due process that have been ignored in this case. The essence of due process is "fundamental fairness." *See, e.g., Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 364 (1985) (fundamental fairness is the "touchstone" of due process); *Quill Corp. v. North Dakota*, 112 S.Ct. 1904, 1913 (1992) ("due process centrally concerns the fundamental fairness of governmental activity"). And it is fundamentally unfair to award attorneys fees and costs in favor of voluntary litigants who are not required to satisfy the most basic, fundamental requirements of standing. Efforts by Colorado's legislature to allow "any person" to avoid those requirements in water cases, and the willingness of Colorado's courts in this case to award vast monetary sums to those who have thus avoided such requirements, cannot withstand due process scrutiny.

Standing's relationship to federal separation of powers doctrine does not preclude relief for AWD. Federal "case or controversy" concepts may not apply to impose federal standing requirements upon Colorado's courts, but that does not mean due process does not operate to impose "fundamental fairness" upon the state's judicial decision-making. The necessity of standing, which is fundamentally a test of basic adversariness, should thus be viewed as a rudimentary component of due process, where, as in this case, a litigant voluntarily

enters court, assumes the role of an adversary, and seeks judicial redress.

Imposition of standing requirements as a component of due process is consistent with the notion that problems typically analyzed in terms of separation of powers might also properly be viewed in light of due process. Professor Davis demonstrated two decades ago that due process often overlaps the separation of powers in the analysis of non-delegation problems. *See* K.C. DAVIS, ADMINISTRATIVE LAW TEXT § 2.09 (1972). Similarly, the concepts of "standing and the right to intervene tend to be governed by the same considerations." *Id.* at § 8.09, p. 206. Since AWD never named the Objectors as parties to its proceedings, they stand in the shoes of intervenors in the classic sense, and so the analysis returns, again, to standing and its absence as a requirement in Colorado water cases.

Like many administrative and specialized tribunals, Colorado's water courts suffer from schizophrenia. "Any person" is invited into the proceedings, and this implies a broad, policy-oriented political process like rule-making or legislation, where a person is free to assert political interests that are not legally differentiated from those of others at large. At the same time, the water court is charged with the task of adjudication, and adjudication by its nature implies the reasoned resolution of particularized disputes between real parties in interest, the ordering of the specific rights and obligations of those parties, and the granting of actual relief in the resolution of those disputes and the ordering of those rights.

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982), this Court struck down the specialized tribunals established by the Bankruptcy

Reform Act because they exercised the "essential attributes of the judicial power" in the ordering of private rights between private parties. Empowering a tribunal that was not truly a "court" to make binding and enforceable awards of money between private parties based upon their private legal rights was not constitutional. *Id.* at 84-87.

In AWD's case, a similar problem is presented: the award by a specialized tribunal of money to putative parties that were not truly litigants. Under Colorado's statutes, the Objectors entered AWD's proceedings as members of the public at large. Under the water court's judgment, they left the proceedings as private victors, with a huge award of AWD's money in their pockets.

AWD had no control over who chose to be Objectors or the size of the money award granted to them. The "expert emeritus" in this case, A-365, testified that much of the work done by the Objectors may have been appropriate "in a[n] area-wide political context of fighting an appropriation, but not in the adjudication process." A-366. As implied by *Northern Pipeline*, and stated by this "expert emeritus," AWD should not be required to pay for the Objectors' political agenda.[3]

The State of Colorado may be free, as a matter of policy, to allow "any person" to have a public say in water cases, but it is not free, as a matter of due process, to allow the water court to order private awards of money in favor of those who have never had to satisfy

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[3] The key differences between standing in cases involving public issues and standing in cases involving the private rights of private parties were explained in Rudolph & Rudolph, *Standing: A Legal Process Approach*, 36 SW. L.J. 857 (1982).

the basic tests of adversariness. When a specialized tribunal orders a party to transfer $2.7 million of its property to others, the proceedings must conform with the basic concept of adjudication as the resolution of particular disputes between specific parties who are truly *legal* adversaries.

Even if, however, the award to the Objectors did not violate due process because they never had to satisfy any standing requirements, then nevertheless due process was still violated because AWD was never afforded a full and fair opportunity to contest the Objectors' entitlement to the award. Despite repeated requests by AWD for a due process hearing on the panoply of entitlement issues, the water court consistently refused to hold such a hearing. A-121; A-127; A-129. AWD's efforts to raise its due process concerns went down, in the court's words, "in blazing technicolor." A-119-120.

This colorful rhetoric may have won popular acceptance for the court in the politically-charged atmosphere of AWD's proceedings, but it hardly responded to the applicant's rights. Even the timing of the court's rulings suggested a conscious willingness to run rough-shod over those rights. Under the federal cases upon which the water court relied, a litigant who seeks to withdraw a claim is given a choice between taking a dismissal without prejudice, which requires the litigant to accept the "terms and conditions" imposed by the court in exchange for the dismissal being without prejudice, or, if those "terms and conditions" are deemed to be too onerous by the litigant, taking instead a dismissal with prejudice, in which case the litigant escapes the "terms and conditions" but suffers the res judicata effect of the judgment. *See, e.g., Yoffee v. Keller Indus., Inc.*, 580 F.2d 127, 131 n.13

(5th Cir. 1978); *Radiant Tech. Corp. v. Electrovert USA Corp.*, 122 F.R.D. 201, 205 (N.D. Tex. 1988). No such choice was given to AWD, since the amount of the award was not fixed until after the trial from which AWD withdrew its Tributary Claim.

AWD avoided the inefficiencies of proceeding to trial on a claim upon which it knew it could not prevail upon the state of the record. It never accepted, nor was it even given an opportunity to accept or reject, the water court's unprecedented award of massive attorneys fees and costs in favor of the Objectors. No hearing was held to determine their entitlement to such an unusual award. Never were the Objectors required to satisfy the most basic requirements of standing. The $2.7 million judgment against AWD in this context violates the Due Process Clause.

CONCLUSION

For the reasons stated, this Court should grant AWD's Petition so Colorado's refusals to enforce federal treaty and constitutional law may be remedied.

Respectfully submitted,

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